

AMENDED IN SENATE MAY 3, 2011
AMENDED IN SENATE APRIL 12, 2011
AMENDED IN SENATE MARCH 21, 2011

SENATE BILL

No. 475

Introduced by Senators Wright and Emmerson

February 17, 2011

An act to amend Sections 5956, 5956.1, 5956.2, 5956.3, 5956.4, 5956.5, 5956.6, 5956.7, 5956.8, 5956.9, and 5956.10 of, and to add Section 5956.12 to, the Government Code, relating to infrastructure financing.

LEGISLATIVE COUNSEL'S DIGEST

SB 475, as amended, Wright. Infrastructure financing.

Existing law authorizes a governmental agency, as defined, to solicit proposals and enter into agreements with private entities for the design, construction, or reconstruction by, and lease to, private entities, for specified types of fee-producing infrastructure projects. Existing law permits these agreements to provide for infrastructure facilities owned by a governmental entity, but constructed by a private entity, to be leased to or owned by that private entity for a period of up to 35 years, *after which time the project would revert to the governmental agency*.

This bill would authorize a local governmental agency to enter into an agreement with a private entity for financing for specified types of revenue-generating infrastructure projects. The bill would require an agreement entered into under these provisions to include adequate financial resources to perform the agreement, and would *additionally* permit the agreements to lease or license to, or provide other permitted

uses by, the private entity for a term of up to 50 years, after which time the project would revert to the governmental agency.

Vote: majority. Appropriation: no. Fiscal committee: no.

State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 5956 of the Government Code is amended
2 to read:

3 5956. Local governmental agencies have experienced a
4 significant decrease in available tax revenues to fund necessary
5 infrastructure improvements. If local governmental agencies are
6 going to maintain the quality of life that infrastructure provides,
7 they must find new funding sources. One source of new money is
8 private sector financing utilized to study, plan, design, develop,
9 finance, construct, maintain, improve, rebuild, repair, operate, or
10 any combination thereof, infrastructure facilities. Infrastructure
11 projects may be financed by a combination of public funding and
12 private sector financing under this chapter. Private sector financing
13 for an infrastructure project under this chapter may include, but is
14 not limited to, cash, cash equivalents, loans, debt assumption,
15 letters of credit, capital investment, in-kind contributions of
16 materials or equipment, construction or equipment financing,
17 carrying of costs during construction, or any combination thereof.
18 Unless private sector financing becomes available to study, plan,
19 design, develop, finance, construct, maintain, improve, rebuild,
20 repair, or any combination thereof, fee-producing infrastructure
21 facilities, some local governmental agencies will be unable to
22 replace deteriorating infrastructure. Further, some local
23 governmental agencies will be unable to expand and build new
24 infrastructure facilities to serve an increasing population.

25 SEC. 2. Section 5956.1 of the Government Code is amended
26 to read:

27 5956.1. It is the intent of the Legislature that local governmental
28 agencies have the authority and flexibility to utilize private sector
29 financing or public financing, and any combination of these
30 financing sources, to study, plan, design, construct, develop,
31 finance, maintain, rebuild, improve, repair, or operate, or any
32 combination thereof, fee-producing infrastructure facilities.
33 Without the ability to utilize these sources of financing to study,

1 plan, design, construct, develop, finance, maintain, rebuild,
2 improve, repair, or operate, or any combination thereof,
3 fee-producing infrastructure facilities, the Legislature finds that
4 some local governmental agencies will not be able to adequately,
5 competently, or satisfactorily retrofit, reconstruct, repair, or replace
6 existing infrastructure and will not be able to adequately,
7 competently, or satisfactorily design and construct new
8 infrastructure.

9 SEC. 3. Section 5956.2 of the Government Code is amended
10 to read:

11 5956.2. It is the intent of the Legislature that this chapter be
12 construed as creating a new and independent authority for local
13 governmental agencies to utilize private sector financing or public
14 financing, and any combination of these financing sources, to
15 study, plan, design, construct, develop, finance, maintain, rebuild,
16 improve, repair, or operate, or any combination thereof,
17 fee-producing infrastructure facilities. To that end, this authority
18 is intended to supplement and be independent of any existing
19 authority and does not limit, replace, or detract from existing
20 authority. This chapter may be used by local governmental entities
21 when they deem it appropriate in the exercise of their discretion.
22 It is the intent of the Legislature that this act create no new
23 governmental entities.

24 SEC. 4. Section 5956.3 of the Government Code is amended
25 to read:

26 5956.3. For purposes of this chapter, the following definitions
27 shall apply:

28 (a) “Fee-producing infrastructure project” or “fee-producing
29 infrastructure facility” means the operation of the infrastructure
30 project or facility will be paid for, in whole or in part, by the
31 persons or entities benefited by or utilizing the project or facility.

32 (b) “Governmental agency” includes a city, county, city and
33 county, including a charter city or county, school district,
34 community college district, public district, county board of
35 education, joint powers authority, transportation commission or
36 authority, or any other public or municipal corporation.

37 (c) “Private entity” includes a person, business entity,
38 combination of persons and business entities, or a combination of
39 business entities.

1 SEC. 5. Section 5956.4 of the Government Code is amended
2 to read:

3 5956.4. A governmental agency may solicit proposals and enter
4 into agreements as authorized under this chapter for the following
5 types of fee-producing infrastructure projects:

- 6 (a) Irrigation.
- 7 (b) Drainage and sanitary sewer systems.
- 8 (c) Energy or power production.
- 9 (d) Water supply, treatment, and distribution.
- 10 (e) Flood control.
- 11 (f) Inland waterways.
- 12 (g) Harbors.
- 13 (h) Municipal improvements.
- 14 (i) Commuter and light rail.
- 15 (j) Highways or bridges.
- 16 (k) Tunnels.
- 17 (l) Airports and runways.
- 18 (m) Purification of water.
- 19 (n) Sewage treatment, disposal, and water recycling.
- 20 (o) Refuse disposal.
- 21 (p) Structures or buildings, except structures or buildings that
22 are to be utilized primarily for sporting or entertainment events.

23 SEC. 6. Section 5956.5 of the Government Code is amended
24 to read:

25 5956.5. Notwithstanding Chapter 10 (commencing with Section
26 4525) of Division 5, or Part 2 (commencing with Section 10100)
27 or Part 3 (commencing with Section 20100) of Division 2 of the
28 Public Contract Code, the governmental agency soliciting proposals
29 and entering into agreements with private entities for the studying,
30 planning, design, developing, financing, construction, maintenance,
31 rebuilding, improvement, repair, or operation, or any combination
32 thereof, by private entities for fee-producing infrastructure projects
33 shall ensure that the contractor is selected pursuant to a competitive
34 negotiation process. Projects may be proposed by the private entity
35 and selected by the governmental agency at the discretion of the
36 governmental agency. Projects may be proposed and selected
37 individually or as part of a related or larger project. The competitive
38 negotiation process shall utilize criteria that the governmental
39 agency identifies in the solicitation documents that must include
40 the following factors applicable to the proposed project: financial

1 or price proposal or approach that features, life cycle-costs,
2 technical approach, an acceptable safety record, experience and
3 qualifications of the private entity to perform the services under
4 the agreement, and any other criteria specifically identified by the
5 governmental agency. The selection criteria shall also ensure that
6 the facility be operated at fair and reasonable prices to the user of
7 the infrastructure facility services. The competitive negotiation
8 process shall not require competitive bidding. The competitive
9 negotiation process shall specifically prohibit practices that may
10 result in unlawful activity including, but not limited to, rebates,
11 kickbacks, or other unlawful consideration, and shall specifically
12 prohibit governmental agency employees from participating in the
13 selection process when those employees have a relationship with
14 a person or business entity seeking a contract under this section
15 that would subject those employees to the prohibition of Section
16 87100. Other than these criteria and applicable provisions related
17 to providing security for any required construction and completion
18 of the facility, the governmental agency soliciting proposals is not
19 subject to any other provisions of the Public Contract Code, this
20 code, or any other statutory provision that relates to public
21 procurements.

22 SEC. 7. Section 5956.6 of the Government Code is amended
23 to read:

24 5956.6. (a) For purposes of facilitating projects, the agreements
25 specified in Section 5956.4 may include provisions for the lease,
26 license, or other permissive use of rights-of-way in, and airspace
27 over, property owned by a governmental agency, for the granting
28 of necessary easements, and for the issuance of permits or other
29 authorizations to enable the private entity to construct, maintain,
30 rebuild, improve, or repair infrastructure facilities supplemental
31 to existing government-owned facilities. Infrastructure constructed
32 by a private entity pursuant to this chapter shall, at all times, be
33 owned by a governmental agency. All public works constructed
34 pursuant to this section shall comply with Chapter 1 (commencing
35 with Section 1720) of Part 7 of Division 2 of the Labor Code. The
36 agreement may provide for the lease or license of those facilities
37 to, or their other permissive use by, the private entity for up to-50
38 35 years. In consideration therefor, the agreement shall provide
39 for complete reversion of the privately constructed facility to the
40 governmental agency at the expiration of the lease, license, or

1 other permissive use at no charge to the governmental agency.
2 Subsequent to the expiration of the period of the lease, license, or
3 other permissive use, the governmental agency may continue to
4 charge fees for use of the infrastructure facility. If, after the
5 expiration of the period of the lease, license, or other permissive
6 use, the governmental agency continues to lease airspace rights to
7 the private entity, it shall do so at fair market value.

8 (b) The agreement between the governmental agency and the
9 private entity shall include, but need not be limited to, provisions
10 to ensure the following:

11 (1) Compliance with the California Environmental Quality Act
12 (Division 13 (commencing with Section 21000) of the Public
13 Resources Code). Neither the act of selecting a proposed project
14 or a private entity, nor the execution of an agreement with a private
15 entity, shall require prior compliance with the act. However,
16 appropriate compliance with the act shall thereafter occur before
17 project development commences.

18 (2) Security for the performance of the agreement and
19 contractual provisions that are necessary to protect the funding
20 and financial terms of the agreement.

21 (3) Adequate financial resources of the private entity to perform
22 the agreement.

23 (4) Authority for the governmental agency to impose user fees,
24 in whole or in part, for use of the facility in an amount sufficient
25 to protect the revenue streams necessary for projects or facilities
26 undertaken pursuant to this chapter. User fee revenues, used in
27 whole or in part, may be paid to the governmental agency or the
28 private entity and shall be dedicated exclusively to payment of all
29 of the following costs relating to the facility, including, but not
30 limited to, the private entity's and the governmental agency's direct
31 and indirect capital outlay costs for the project, direct and indirect
32 costs associated with financing of the facility, including interest,
33 principal, repayment, issuance, and refinancing costs, direct and
34 indirect costs associated with operations, direct and indirect user
35 fee collection costs, direct and indirect costs of administration of
36 the facility, direct and indirect costs of maintenance, and other
37 project-related costs, including a reasonable return on investment
38 to the private entity as set forth specifically in the agreement, or
39 included as part of the costs and fees, as negotiated or determined
40 during the procurement process.

1 (5) As a precondition to the imposition or increase of a user fee,
2 the governmental agency shall conduct at least two public hearings
3 at which public testimony will be received regarding a proposed
4 user fee revenue or increase in user fee revenues. The public
5 hearings shall precede the action by the governmental agency to
6 actually impose a user fee or to increase an existing user fee. The
7 governmental agency shall consider the public testimony prior to
8 imposing a new or increased user fee. The governmental agency
9 shall provide the following notices and utilize the following
10 procedures:

11 (A) Notice of the date, time, and place of the meeting, including
12 a general explanation of the matter to be considered, shall be mailed
13 at least 14 days prior to the meeting to any interested party who
14 files a written request with the governmental agency for mailed
15 notice of the meeting on new or increased fees or service charges.
16 Any written request for mailed notices shall be valid for one year
17 from the date on which it is filed unless a renewal request is filed
18 prior to the expiration of the one-year period for which the written
19 request was filed. The legislative body may establish a reasonable
20 annual charge for sending notices based on the estimated cost of
21 providing the service.

22 (B) At least 10 days prior to the meeting, the governmental
23 agency shall make available to the public data that supports the
24 amount of the fee or the increase in the fee.

25 (C) (i) At least 10 days prior to the meeting, the governmental
26 agency shall publish a notice in a newspaper of general circulation
27 in that agency's jurisdiction stating the date, time, and place of the
28 meeting, including a general explanation of the matter to be
29 considered.

30 (ii) Any costs incurred by the governmental agency in
31 conducting the meeting or meetings required by this section may
32 be recovered from fees charged for the services that are the subject
33 of the fee.

34 (iii) For infrastructure projects specifically authorized by this
35 chapter, at least 10 days prior to the meeting, the governmental
36 agency shall publish for four consecutive times, a notice in the
37 newspaper of general circulation in the affected area stating in no
38 smaller than 10-point type a notice specifying the subject of the
39 hearing, the date, time, and place of the meeting, and in at least
40 8-point type a general explanation of the matter to be considered.

(D) No governmental agency shall levy a new fee or service charge or increase an existing fee or service charge to an amount that exceeds the estimated cost for which the user fee revenues are dedicated pursuant to paragraph (4). Any action by a governmental agency to levy a new fee or service charge or to approve an increase in an existing fee or service charge pursuant to this chapter shall be taken only by ordinance or resolution. The legislative body of a governmental agency shall not delegate the authority to adopt a new fee or service charge, or to increase a fee or service charge.

(6) Require that if the legislative body of the governmental agency determines that fees or service charges create revenues in excess of the actual cost for which the user fee revenues are dedicated pursuant to paragraph (4), those revenues shall either be applied to any indebtedness incurred by the private entity or the governmental agency with respect to the project, be paid into a reserve account in order to offset future operation costs, be paid into the appropriate government account, be used to reduce the user fee or service charge creating the excess, or a combination of these sources.

(7) If the private entity operates the facility, require the private entity to maintain the facility in good operating condition at all times, including the time the facility reverts to the governmental agency.

(8) Preparation by the private entity of an annual audited report accounting for the income received and expenses to operate the facility. The private entity shall make that report available to any member of the public for a cost not to exceed the cost of reproduction of the report.

(9) Provision for a buyout of the private entity's capital investment by the governmental entity in the event of termination or default before the end of the lease term.

(10) Provision for appropriate indemnity promises between the governmental agency and the private entity.

(11) Provision requiring the private entity to maintain insurance with those coverages and in those amounts that the governmental agency deems appropriate.

(12) In the event of a dispute between the governmental agency and the private entity, both parties shall be entitled to all available legal or equitable remedies.

1 SEC. 8. Section 5956.7 of the Government Code is amended
2 to read:

3 5956.7. (a) The governmental agency may exercise any power
4 possessed by it with respect to the development and construction
5 of infrastructure projects pursuant to this chapter. Agreements for
6 the maintenance and operation of services entered into pursuant
7 to this chapter shall provide for full reimbursement for services
8 rendered by the governmental agency in accordance with the terms
9 and conditions specified in the agreement. The governmental
10 agency may provide services for which it is reimbursed with respect
11 to preliminary planning, environmental certification, and
12 preliminary design of the infrastructure projects. The governmental
13 agency may consult with legal, financial, and other consultants in
14 the negotiation and development of the agreement. To the extent
15 existing public utility infrastructure is necessarily required to be
16 modified, relocated, or removed in order for an infrastructure
17 project authorized by this chapter to be constructed, the cost of
18 modification, relocation, or removal of the existing infrastructure
19 shall be borne by the private entity and included as a recoverable
20 capital cost of the project. This cost shall not be construed to
21 include costs of increasing the capacity, or upgrading, or improving
22 the existing public utility infrastructure.

23 (b) The private entity's responsibility to modify, relocate, or
24 remove existing public utility infrastructure shall not alter any
25 agreements that may be in place between the governmental agency
26 and any public utility regarding projects funded by the
27 governmental agency.

28 (c) In the event of a dispute regarding the reimbursement
29 required, a private entity may request an audit of the public utility's
30 costs by a mutually acceptable certified public accountant. The
31 result of the audit shall determine the actual costs. If the audit
32 indicates that the public utility's actual costs were less than 95
33 percent of the cost claimed, the cost of the audit shall be borne by
34 the public utility. If the audit indicates that the public utility's
35 actual costs were 95 percent or more of the cost claimed, the cost
36 of the audit shall be borne by the private entity.

37 SEC. 9. Section 5956.8 of the Government Code is amended
38 to read:

39 5956.8. The plans and specifications for each project
40 constructed pursuant to this chapter shall comply with all applicable

1 governmental design standards for that particular infrastructure
2 project. The private entity performing the agreement shall utilize
3 private sector design and construction firms to design and construct
4 the infrastructure facilities. However, a facility subject to this
5 chapter and leased, licensed, or permitted to a private entity shall,
6 during the term of the lease, license, or permit, be deemed to be
7 public property for purposes of identification, maintenance,
8 enforcement of laws, and for purposes of Division 3.6
9 (commencing with Section 810). All construction, alteration,
10 demolition, installation, and repair work pursuant to this chapter
11 shall comply with Chapter 1 (commencing with Section 1720) of
12 Part 7 of Division 2 of the Labor Code.

13 SEC. 10. Section 5956.9 of the Government Code is amended
14 to read:

15 5956.9. In order to use the authority conferred by this chapter
16 to the maximum extent, a governmental agency may use private
17 infrastructure financing pursuant to this chapter as the exclusive
18 funding or revenue source or as a supplemental funding or revenue
19 source with federal or local funds. The governmental agency
20 involved may be a local governmental agency or a combination
21 of local governmental agencies. The governmental agency may
22 work cooperatively with the California Infrastructure and Economic
23 Development Board with regard to the design, construction,
24 operation, and financing of privately financed facilities, but the
25 projects will not be subject to the review or approval of that board.

26 SEC. 11. Section 5956.10 of the Government Code is amended
27 to read:

28 5956.10. Notwithstanding any provision of this chapter, neither
29 the state or any state agency may directly or indirectly use the
30 authority in this chapter, nor may any governmental agency as
31 defined in Section 5956.3, use the authority in this chapter, to
32 design, construct, finance, or operate a state project. For purposes
33 of this section, a state project includes any of the following:

- 34 (a) Toll roads on state highways.
- 35 (b) State water projects.
- 36 (c) State park and recreation projects.
- 37 (d) State financed projects.

38 These limitations shall not prohibit the state, any state agency,
39 or any governmental agency as defined in *subdivision (b)* of Section
40 5956.3, from utilizing authorizations contained in other provisions

1 of law. This section shall not be construed to prohibit a
2 governmental agency from using this chapter to accomplish
3 projects that are not expressly prohibited in this section.

4 SEC. 12. Section 5956.12 is added to the Government Code,
5 to read:

6 5956.12. The governmental agency may determine the validity
7 of any permits, authorizations or approvals, contracts and
8 agreements, user fees, and other actions taken pursuant to this
9 chapter, by initiating a validating proceeding, as provided in
10 Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of
11 the Code of Civil Procedure. The validating action may also be
12 initiated by interested persons as provided in Chapter 9
13 (commencing with Section 860) of Title 10 of Part 2 of the Code
14 of Civil Procedure.

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